Crl.A. 231/2003
BEFORE
THE HON'BLE MR JUSTICE D. BISWAS, CHIEF JUSTICE (ACTG)
THE HON'BLE MR JUSTICE B.D. AGARWAL
JUDGMENT AND ORDER

B.D. AGARWAL,J.

1. The appellants have been convicted under Section 302 read with Section 34 of I.P.C. vide Judgment and Order dated 03.06.2003 passed by the Learned Sessions Judge, Bogaigaon in Session Case 51(B) of 2000. The appellants have been sentenced to undergo imprisonment in life and to pay fine of Rs. 5,000/- with default sentence of 6 months R.I. Being aggrieved with this conviction, the convicts have filed this common appeal.

2. We have heard Shri M.U.Mahmud, learned counsel for the appellants. The State was represented by Shri K.C. Mahanta, learned Addl. P.P for the State. We have also perused the impugned judgment and record. An FIR was lodged by the brother of the deceased on 13.09.1998 alleging that while the deceased Suraj Zamal was returning home from Bijni Bazar in the evening, he was waylaid by the appellants and stabbed him to death. This FIR was registered as Bijni P.S. case No. 90 of 1998 under Section 341,302 and 34 of the I P C. After the trial the appellants have been convicted under Section 302 and 34 of IPC.

3. As gathered from the impugned judgment, the appellants have been convicted primarily on the evidence of dying declaration allegedly given by the deceased orally to the witnesses who had assembled at the place of occurrence. According to the learned counsel for the appellants the story of giving dying declaration is a concocted one considering the grievous injuries sustained by the deceased. According to the learned counsel with such injuries it is absolutely improbable to utter even few words. We have find from the record that the deceased was assaulted at the random with sharp weapons causing the following injuries:

1. Two pointed cut injuries seen on the lower portion of the abdomen, oblique in direction with blood clot in and around the injuries, through which the loops of intestine comes out. Sizes of the injuries are -3cm x 2 cm x 5cm, 3 ‰ cm x 2 cm x 5 cm.
2. Two pointed cut injuries on the back of the head with the fracture of the several bones with blood and blood clot in and around the injuries through which brain matter came out. Size of the injury-
3cm x 2 cm x 3 cm, 2 ‰ cm x 2 cm. X 3 cm.
3. One cut injury of the front of the right leg below the knee joint and one on the left leg below the knee joint seen with blood and blood clot in and around the injuries. Size- 4 cm x 1 cm x ‰ cm, 3 cm x 1 cm x ‰ cm.

The injuries described in external appearance and irrespective column are ante mortem in nature with ante-mortem blood and blood clot and they are grierous.

In my opinion the cause of death is due to shock and hearmorrhage as a result of injuries sustained.

Dead body was identified by UBC/133 Md. Lambit Somuah, 2 Mahammad Ali and 3. Md. Abbas Ali.

Ext. 7 is post mortem report Ext.(i) my signature.

Ext.7(ii) is the signature of the Joint Director known to me.

Time of death is estimated to be before 24 hours from the time of examination. Due to such injuries the victims generally suffer from shock and may also be senseless.

In the impugned judgment the learned Sessions Judge has observed that the medical evidence is not categorical or clear enough to take a view tha

t the deceased could have given any dying declaration. The relevant observations of the Sessions Judge are as follows:

> There is no definite opinion from the doctor as to whether the victim was in a position to speak in spite of having so many injuries .

4. During the course of argument of this appeal, this court had also summoned a doctor from GMCH to obtain opinion whether the deceased could have given any dying declaration. Accordingly, Dr. B.K. Baishya appeared before this Court and his statement/deposition was recorded on 08.01.2007 as C W 1. Since the opinion of the said Medical Officer is relevant to decide the capability of giving dying declaration by the deceased, the said opinion is extracted below:

> I have gone through the postmortem report and the injuries sustained by the deceased. A person after having sustained injuries of the nature described in the postmortem report, particularly the head injuries, may not be in a position to make any statement but exceptions are there where some persons can make one of two statements even after sustaining such injuries.
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> The doctor examined by this Court is the Professor and Head of the Department of Neurosurgery of the premier Medical Institute of Assam. Hence, his opinion will certainly carry full weight. The doctor has virtually ruled out the possibility of giving any dying statement by the deceased.

5. After going through the entire evidence on record we find that altogether 6 witnesses have spoken about the dying declaration. All these witnesses reached the site of occurrence subsequently. The witnesses, who have deposed about the dying declaration, are PWs 1,2,3,5,6 and 7. These witnesses did not live very close to the P.O. Some of the witnesses came from a distance of more than one furlong and at least PW 2 came from a distance of one mile. This apart, we do not find any variation in the depositions of the aforesaid witnesses with regard to the dying declaration. In other words, the depositions of the aforesaid witnesses are identical as if they reached to the P.O. together and deceased disclosed the names of the assailants at the same time. However, after going through the evidence it appears to us that the witnesses did not arrive at the P.O simultaneously, and there was no scope of repetition of the dying declaration. On this ground also the testimony of P.Ws 1,2,3,5,6 and 7 do not inspire our confidence.

6. We also find that the PW 1 has admitted in the cross-examination that when he reached the P.O. the deceased was lying asleep, indicating that the injured was not speaking to the persons. Besides this, P.Ws 6 and 7 have also admitted in the cross examination that the injured was groaning and moaning. All these depositions are in consonance with the medical opinion (through C W 1) that the deceased was physically and mentally not capable to give any dying declaration.

7. The other ground to record the conviction is that just before the incident of murder P.W -4 had noticed the accused Abbas sitting on the road near the P.O. We find that the incident took place on a market day and many people were returning from Bijni market. Hence, it is difficult to accept the prosecution version that P.W. 4 must have marked the said accused on the road. Be that as it may, neither P.W 4 talked with the said accused nor Abbas was found in company with other accused persons. This ground of conviction also appears to us to be a weak one and cannot be made foundation for recording conviction.

8. The third ground for conviction of the appellants is that the FIR was lodged promptly naming, the appellants. However, it is apparent on record that there was no enmity and disputes, involving, the appellants, informant and deceased. Hence, the possibility of incorporating the names of the appellants in the FIR on suspicious cannot be totally ruled out.

9. After surveying the entire evidence on record we have come to t

he conclusion that it would not be safe to uphold the conviction due to unreliab le testimony of witnesses. In other words, the appellants deserve to be acquitte d, at least on the principle of benefit of the doubt. Consequently the appeal su cceeds. The impugned judgment and order of conviction is hereby set aside. All t he 3(three) appellants are hereby acquitted and they shall be set at liberty for thwith, unless wanted in any other case.